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No. 06-1653

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

ERIC CLEMMONS,
Petitioner,

v.

ESTATE OF GEORGE BROOKS,
AND ALONZO GROSS,
AND WILLIAM ARMONTROUT
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO QUESTIONS PRESENTED

This case arises from Petitioner's claim that he stated a constitutional violation, cognizable under 42 U.S.C. §1983, by asserting that an investigator and other officials in a correctional facility allegedly failed to provide to a prosecutor arguably exculpatory evidence that the investigator had determined was not credible and by so doing violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963). His "Questions Presented" deal not with the merits of his claim, but with whether the decision below conflicts with those of that and other courts. The body of his petition suggests that if certiorari is granted, he would ask the Court to answer the following questions:

1. Can a criminal defendant state a *Brady* claim against a corrections investigator and his superiors on the basis that they failed to provide to a prosecutor an exculpatory statement that they found to be false?

2. Was the Eighth Circuit's application of its "recklessness" standard so far out of line with the Eighth Circuit's own precedents as to merit reversal?

3. When the facts are undisputed that one corrections officer obtained an exculpatory statement, but after that brief involvement turned the matter over to another officer who completed the investigation, prepared a report, and transmitted it to his superior, and the subsequent transmission to the prosecutor may not have contained the statement, is the question whether the first officer's failure to ensure transmittal of the statement to the prosecutor one of fact that must be decided by a jury?

4. Does the statement by one inmate that he told a warden that a defendant was wrongly convicted of murder create an issue of fact as to the personal involvement of the warden with regard to disclosure of a statement made by another inmate about a murder?

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STATEMENT OF THE CASE

This matter comes to Court on summary judgment. As the Court recognized in *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), to defeat summary judgment Clemmons may not simply rest on the allegations in his petition but must present evidence that shows a material dispute of fact. Clemmons, instead of presenting evidence, relies on accusations that are unsupported by the record. The undisputed facts of this case are as follows:

On August 7, 1985, while Clemmons was incarcerated at the Missouri State Penitentiary ("MSP"), fellow inmate Henry Johnson was stabbed three times, leading to his death. Eighth Circuit Appendix of Estate of George Brooks ("Brooks App.") at 111-12. Corrections Officer Thomas Steigerwald witnessed the stabbing and identified Clemmons as the perpetrator.[1] *Id.* at 106. When the assault occurred, Officer Steigerwald called for assistance, and Respondent Alonzo Gross, a Captain at MSP, responded to the call. *Id.* Steigerwald and Gross caught Clemmons and escorted him to a holding cell. *Id.* at 105-06. They noticed bloodstains on Clemmons's sweatshirt and tennis shoes. *Id.* at 111-16.

While in the holding cell, Clemmons told Gross, "I guess they got me."[2] *Clemmons v. Delo*, 124 F.3d 944, 946 (8th Cir. 1997) And when officers searched the cell of the

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[1] Clemmons asserts in his petition that Officer Steigerwald testified in the 2000 trial that it was dark outside at the time of the stabbing and that Steigerwald was more that 80 yards away. Petition at 3. That testimony was not part of the record in this case. And from the 1987 trial record, the Eighth Circuit concluded that Steigerwald was "10 to 15 feet away." *Delo*, 124 F.3d at 951 (8th Cir. 1997).

[2] In his statement of facts, Clemmons refers to Gross's testimony at Clemmons's criminal trial but that testimony is not part of the record in this case.

inmate Steigerwald saw standing next to Clemmons at the time of the attack, they found books and a hat belonging to Clemmons that also had bloodstains on them. Brooks App. at 111-16.

After capturing Clemmons, Gross returned to the stabbing scene and ordered a search for the weapon. *Id.* During this search, inmate Dwight Clark approached Gross and told him that he had witnessed two men assaulting Johnson. Brooks App. at 104. He described both assailants as being black, stated his belief that one was inmate Fred Bagby, and explained that he only knew the second inmate by sight. *Id.* Gross questioned inmate Clark, reviewed the out-count list, and concluded that inmate Clark's statement was not credible. *Id.*

After receiving and investigating inmate Clark's statement, Gross prepared an Inter-Office Communication ("IOC") outlining what he had done to investigate the stabbing. *Id.* Gross noted his reservations about inmate Clark's statement, concluding, "When questioned in detail Clark did not make sense and further investigation reflects that Clark's statement is untrue." *Id.* He sent the IOC to Respondent Brooks, the MSP investigator assigned to the murder investigation. *Id.*

Prior to the attack, Clemmons and inmate Johnson had shared a cell at MSP but were separated, on Brooks's initiative, after Brooks learned that the two inmates had problems with each other. *Id.* at 233.

After Brooks completed his investigation, he forwarded an investigation report to Respondent Armontrout, who then forwarded that report to the Cole County Prosecuter.[3] *Id.* at 188-89. The initial report

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[3] Clemmons asserts that Brooks chose not to interview other eyewitnesses or pursue important leads. Petition at 4.

forwarded to the prosecuting attorney by Armontrout did not contain the IOC.[4] *Id.* at 111-16.

The prosecuting attorney charged Clemmons with the murder of inmate Johnson; Clemmons was convicted in 1987. Brooks App. at 80.

In 1997, Clemmons filed a petition for writ of habeas corpus, alleging that his counsel was never shown the exculpatory evidence, the IOC, prior to his trial. *See Delo*, 124 F.3d at 947. The State responded that the IOC was in inmate Johnson's inmate file, which was reviewed by Clemmons' counsel. The Eighth Circuit did not resolve the issue of whether the IOC had been made known to Clemmons's counsel because, the court concluded, "[w]hether framed as an ineffective assistance of counsel claim or as a *Brady* claim, Clemmons's claim undeniably states a constitutional violation." *Id.* at 949. The court granted the writ. Id. at 956.

The State then retried Clemmons for the Johnson murder; this time, a jury acquitted him.

Approximately three years later, Clemmons filed this lawsuit under 42 U.S.C. §1983, alleging that he was deprived of his liberty interest in a fair trial due to Respondents' intentional or reckless failure to disclose or investigate exculpatory leads or exonerating information.

There is no evidence in the record of any "eyewitnesses" other than Officer Steigerwald and inmate Clark.

[4] Clemmons repeatedly asserts that this report was the only contact Brooks, or any prison official, had with the prosecutor. Petition at 5. There is no evidence to support this assertion, nor to support his conclusion that the IOC was not later provided to the prosecutor.

Additionally, Clemmons misstates the testimony of Armontrout. Petition at 5. Armontrout testified at his deposition that it was not uncommon for the initial report to the prosecutor's office not to contain all the information discovered in the investigation.

In September 2005, the Honorable Scott O. Wright, United States District Judge, entered summary judgment for Gross and Armontrout. Petition Appendix ("Pet. App.") at 24-32. The court found that, as a matter of law, Clemmons had failed to present sufficient evidence to prove Gross and Armontrout had sufficient "personal involvement" in the deprivation of Clemmons's constitutional rights. Pet. App. at 29-30.

In November 2005, the district court entered summary judgment for Brooks with respect to Clemmons's state law claims, but denied the motion with respect to his constitutional claim, holding that Brooks was not entitled to qualified immunity. Pet. App. at 11-23. The court held that a reasonable jury could determine that Brooks's failure to investigate the information set forth in the IOC, and his failure to forward the IOC to the prosecutor's office, was the result of reckless or deliberate intent and not that of mere negligence. *Id.* at 20.

In February 2007, the Eighth Circuit reversed the denial of summary judgment as to Brooks and affirmed the summary judgment for Gross and Armontrout. Pet. App. at 10.

With respect to Brooks, the Eighth Circuit held that "Clemmons adduced no evidence that Brooks acted intentionally, recklessly, or in bad faith when he failed to disclose the IOC to the prosecutor and failed to investigate Clark's statement that Bagby murdered Johnson." *Id.* at 8. Because Brooks did not violate Clemmons's constitutional rights, the court reversed the denial of summary judgment. *Id.*

The Eighth Circuit held that Gross and Armontrout had only "minimal personal involvement in the investigation." *Id.* at 9-10. Gross was only involved in the investigation until Brooks arrived to take it over. And forwarded the information he received from inmate Clark

to Brooks. *Id.* The Eighth Circuit held that Armontrout's general supervisory duties were insufficient to establish personal involvement in the investigation. The Eighth Circuit noted, specifically, that Armontrout had no direct involvement in the investigation and that Brooks was the person who assembled that packet of investigatory materials for the prosecutor. *Id.* The Eighth Circuit affirmed the district court's decision that Clemmons's failed to establish sufficient personal involvement by either Gross or Armontrout to establish liability pursuant to 42 U.S.C. § 1983. Pet. App. at 10.

REASONS TO DENY THE WRIT

I. The Eighth Circuit's decision regarding Clemmons's claims against Brooks was consistent with the Court's precedents that impose *Brady* obligations on prosecutors.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. To comply with *Brady*, a prosecutor must "learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles v. Whitley*, 514 U.S. 419 (1995). The Court's holding in *Brady* ensures the proper disclosure of exculpatory evidence by the prosecution in criminal proceedings. Under *Brady*, the prosecutor is responsible for failing to produce materially favorable evidence regardless of fault, that is, regardless of whether the suppression was intentional or in bad faith. 373 U.S. at 87.

The Court has never imposed this absolute duty on law enforcement officials other than prosecutors. To the contrary, the Court has rejected the argument that *Brady* obligations should be shifted from prosecutors to other state actors. In *Kyles*, the state urged this Court to find that the prosecutor had not violated *Brady* because the prosecution had never been informed of the exculpatory evidence at issue in that case. This Court rejected that argument, finding that it would "amount to a serious change of course from the *Brady* line of cases." *Kyles*, 514 U.S. at 438. Instead, the Court stated that prosecutors should establish procedures and regulations to ensure communication of all information to each attorney working on every case. *Id.* (*citing Giglio v. United States*, 405 U.S. 150, 154 (1972)).

To reach beyond the prosecutor, Clemmons cites *Youngblood v. West Virginia*, --- U.S. ----, 126 S.Ct. 2188 (2006). There the Court may have moved beyond *Brady* and *Kyles* – but not so far as Clemmons suggests. In *Youngblood*, the Court stated that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" *Id.* at 2190 (*quoting Kyles*, 514 U.S. at 438)). The Court continued to quote from *Kyles*: "The individual prosecutor has a duty to learn of any favorable evidence known to the other acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437, quoted at 126 S.Ct. at 2190. Despite its reference in *Youngblood* and *Kyles* to other actors, the Court has always placed ultimate responsibility for complying with *Brady* on prosecutors. They are in the best position to determine what may or may not become *Brady* material throughout the criminal process.

Not surprising, given that placement of responsibility, nothing in *Brady*, *Kyles*, or *Youngblood* – or in any case referenced by Clemmons –suggests that a police officer or a corrections officer or someone else who may encounter *Brady* information is subject to civil liability for merely failing to ensure that it is provided to a defendant. The Eighth Circuit's refusal to create such liability is not in conflict with any decision Clemmons cites.

II. The Eighth Circuit's decision was consistent with its usual course of judicial proceedings.

Clemmons argues that "the Eighth Circuit strayed from established authority, usurped the jury's role, improperly took facts in the light most favorable to Defendants, and found that, as a matter of law, Mr. Brooks's actions were not intentional or reckless. Petition at 13. Clemmons finds "the Eighth Circuit's usual course of judicial proceedings" in a single decision, *Wilson v.*

Lawrence County, Mo., 260 F.3d 946 (8th Cir. 2001). There, the Eighth Circuit held the negligent failure to investigate other leads does not violate due process and a plaintiff must show that the defendants acted with at least a reckless intent. *Id.* at 955-56. In *Wilson*, a former prisoner brought claims pursuant to §1983 alleging that police officers coerced him into confession to a crime he did not commit; used false testimony to secure his conviction; and failed to investigate other suspects. *Id.* at 950. In regards to Wilson's claim that the defendants failed to investigate additional suspects, the Eighth Circuit held that, absent the evidence of the coercion of Wilson's confession and the reliance on knowingly false evidence, the failure to investigate additional leads, alone, would not support a claim of recklessness or deliberate intent and would not comprise a constitutional violation. *Id.* at 955.

Assuming that departure from a single prior precedent could constitute a basis for granting certiorari, this would not be such a case. The two cases are easily distinguishable, for Clemmons, unlike Wilson, presents no evidence that the State actors relied on false evidence or coercion; Clemmons relies exclusively on allegations of potential leads that Brooks did not follow. This is precisely the kind of claim that the Eighth Circuit in *Wilson* held would not constitute a constitutional violation.

Nor did the Eighth Circuit depart from *Wilson* by failing to follow the well-established rule that on summary judgment it had to view the facts in a light most favorable to Clemmons. Petition at 13. To make his claim, Clemmons ignores what the court really said and did in *Wilson*. There, the court said that at the summary judgment stage, the reviewing court should take as true those facts asserted by the non-moving party that are properly supported by the record. *Wilson*, 260 F.3d at 951. Here, Clemmons fails to identify what facts were not taken in the light most favorable to him that are properly

supported by the record. Moreover, Clemmons does not identify any factual disputes in the record that the Eighth Circuit ignored and would have precluded its finding in favor of granting Brooks judgment as a matter of law. The material facts of this case remain undisputed and as the Eighth Circuit correctly held, the issue before the court was an issue of law, not fact, and summary judgment was appropriate. Pet. App. at 8.

Furthermore, the Eighth Circuit did not err in concluding that Clemmons failed to present evidence that Brooks either recklessly or intentionally failed to investigate additional leads or disclose exculpatory evidence. *Id.* Clemmons seems to believe that to obtain summary judgment, Respondents had to present undisputed evidence that they investigated everything. But such exhaustion is not the law. For example, as the Court has held that when motive is a critical issue, summary judgment is appropriate if the plaintiff fails to "identify affirmative evidence from which a jury could find that plaintiff has carried his or her burden of proving the pertinent motive." *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998). And this Court has held that the Constitution does not require that an official "independently investigate every claim of innocence," or "to perform an error-free investigation of such a claim." *Baker v. McCullon*, 443 U.S. 137, 145-46 (1939).

In this case, although Clemmons argues that Brooks could have done more in his investigation, there is no evidence that Brooks acted in bad faith, that is, engaged in "a conscious effort to suppress exculpatory evidence." *California v. Trombetta*, 467 U.S. 479, 488 (1984). In *Wilson*, were there was evidence the defendants may have coerced Wilson and intentionally relied on false evidence. But, there is no evidence that Brooks made any conscious effort to suppress evidence. The only alleged eyewitness account that Brooks did not independently pursue came from inmate Clark. And, Brooks became aware of inmate Clark's account from

Gross's IOC which stated that inmate Clark's statement was untrue. Clemmons points to no evidence as to why Brooks had to doubt Gross's assessment of inmate Clark's story.[5]

Also supporting the Eighth Circuit conclusion that there is no evidence of bad faith by Brooks is the fact that the Clemmons's only evidence to support his claim that Brooks withheld exculpatory evidence is the omission of the IOC (and thus the Clark statement) from the initial report of the murder sent by Brooks to Armontrout and forwarded to the prosecutor's office, which identified Clemmons as a suspect. As Armontrout testified, it was not unusual for such a reports not to contain all the evidence obtained by investigators. Brooks App. at 191. There is no evidence in the record before the Court that the IOC was not given to prosecutors in subsequent disclosures. Furthermore, as the State argued in Clemmons's habeas proceeding, the IOC was made a part of Johnson's prison file which the State provided to Clemmons's criminal attorney. *Delo*, 124 F.3d at 947, fn. 2. Again, Clemmons has failed to present any evidence regarding when the prosecution was given the IOC or when his criminal attorney was made aware of the IOC.[6]

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[5] In his third point, when discussing the alleged liability of Armontrout, Clemmons relies on an affidavit from inmate Mayes, who states that it was "common knowledge" that Clemmons did not stab inmate Johnson. But there is no evidence Brooks was aware of inmate Mayes's statements. And even if Brooks was aware of these statements, inmate Mayes statements are based on gossip and speculation, not personal knowledge or fact. There is no evidence that if Brooks talked to Mayes, he would have discovered any useful information or evidence tending to disprove what the evidence made abundantly clear, that Clemmons was a suspect in the murder of inmate Johnson.

[6] Clemmons's only evidence to support his claims is that he, personally, was not aware of the IOC until after he was convicted of inmate Johnson's murder. This is not evidence that Brooks did not produce this information to the prosecutors.

III. The Eighth Circuit's decision regarding Clemmons's claims against Gross and Armontrout does not conflict with Second Circuit case law.

Clemmons argues that the Eighth Circuit's holding conflicts with the Second Circuit approach in that: 1) the Eighth Circuit fails to recognize personal involvement as a question of fact; 2) Gross and Armontrout were not subject to liability because of their on "minimal" involvement; and 3) the Eighth Circuit does not recognize personal involvement through failure to remedy a wrong. Petition at 14. The listed "conflicts" are wholly chimerical. Although the Second and Eighth Circuits vary slightly in the wording of their approach to the "personal involvement" requirement of §1983, the Eighth Circuit's analysis does not conflict with the Second Circuit.

Both the Eighth and Second Circuits hold that under §1983, a showing of a defendant's personal involvement in alleged constitutional violations is a prerequisite to liability. *Cox v. Sugg,* 484 F.3d 1062, 1067 (8th Cir. 2007); *Williams v. Smith,* 781 F.2d 319, 323 (2nd Cir. 1986). Both circuits have also hold that liability cannot rest on a theory of respondeat superior. *Hahn v. McLey*, 737 F.2d 771, 773 (8th Cir. 1984); *Hernandez v. Keane*, 341 F.3d 137, 144 (2nd Cir. 2003). And, both circuits hold that liability for personal involvement requires proof of a "causal link" between the defendant's actions and the injury, or "direct responsibility" for the alleged deprivation of rights. *Mayorga v. Missouri*, 442 F.3d 1128, 1132 (8th Cir. 2006); *Poe v. Leonard*, 282 F.3d 123, 140 (2nd Cir. 2002).

In the Second Circuit, in order to prove "personal involvement," a plaintiff must demonstrate that the defendant has 1) directly participated in the violation; 2) has failed to remedy a wrong when acting in a

supervisory capacity; 3) has created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue; or 4) was grossly negligent in managing subordinates who caused the unlawful condition or event. *Williams*, 781 F.2d at 323-24. In the Eighth Circuit, a defendant can be found to be personally involved where the defendant 1) directly participated in the constitutional violation; 2) where a supervisory official, after learning of the alleged violation, failed to take adequate remedial measures; 3) where corrective action amounted to deliberate indifference to, or tacit authorization of, violative practices; or 4) where a supervisor breached his duty to adequately train or supervise the actions of subordinates. *Cox*, 484 F.3d at 1067. The Eighth and Second Circuit approaches to "personal involvement" under §1983 are substantially the same.

Clemmons correctly asserts that the Second Circuit, in *Williams,* stated that personal involvement is a question of fact for the jury. 781 F.2d at 323. Clemmons takes the Second Circuit's statement out of context, however. As the Second Circuit stated, "Since personal involvement is a question of fact we are governed by the general rule that summary judgment may be granted only if no issues of material fact exist and the defendants is entitled to judgment as a matter of law." *Id.* In fact, in *Williams*, the Second Circuit affirmed summary judgment in favor of a prison guard whose involvement in the claim was limited to preparing and submitting a report that the inmate claimed was false. *Id.* at 324.

Clemmons incorrectly asserts that the Eighth Circuit "does not recognize" that personal involvement is a question of fact. But in *Mayorga,* the Eighth Circuit stated that in order to establish personal liability, the plaintiff must allege "specific facts of personal involvement." 442 F.3d at 1132. Nothing here suggests that the Eighth Circuit removed those facts from the usual summary judgment routine.

And summary judgment was available here because the specific facts of Gross and Armontrout's personal involvement are not disputed. Clemmons does not identify a single fact that he believes remains in dispute that would preclude summary judgment for either Gross or Armontrout. Instead, what Clemmons actually argues is that the facts in this case are, as a matter of law, sufficient to state a claim against Gross and Armontrout. Clemmons misinterprets the Eighth Circuit's holding, and erroneously asserts that the "length or degree" of a defendant's personal involvement is not significant. Even if Clemmons were correct, a court cannot impose liability upon a defendant, no matter how significant his personal involvement, absent proof that the involvement had a causal link to the alleged constitutional violation. *Poe*, 282 F.3d at 140; *Mayorga*, 442 F.3d at 1132. And, Clemmons has failed to show either sufficient facts to support his claim or that those facts create a causal link to his injury.

Clemmons also asserts that the Eighth Circuit's holding conflicts with the Second Circuit's approach to personal involvement in that the Eighth Circuit did not consider a defendant's failure to "remedy a wrong" as a violation of Clemmons's constitutional rights. Petition at 15. But as described above, in both the Eighth and Second Circuits, a defendant may be found to be "personally involved" for purposes of §1983 when he fails to take adequate remedial action. *Williams,* 781 F.2d at 323; *Cox,* 484 F.3d at 1067. Although the wording differs slightly, the approaches of both the Second and Eighth Circuits take into consideration whether a defendant has taken action to remedy a wrong. *Williams,* 781 F.2d at 323; *Cox,* 484 F.3d at 1067.

In this case, Clemmons failed to prove all of the elements of the "personal involvement" requirement, specifically that Gross and Armontrout's personal involvement had a "causal link" to the alleged

constitutional violations. Federal Rule of Civil Procedure 56(c) allows for summary judgment when there is no issue of material fact, and a moving party is entitled to judgment as a matter of law. Because causation and fault are essential to holding a defendant liable for personal involvement, failure to establish those elements entitled Gross and Armontrout to judgment as a matter of law, and therefore summary judgment was proper.

CONCLUSION

For the reasons stated above, the Court should deny the writ.

Respectfully Submitted,

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